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| UNITED STATES OF AMERICA | ) | IN THE COURT OF MILITARY COMMISSION REVIEW |
| | ) | |
| | ) | APPELLANT'S BRIEF IN RESPONSE TO DEFENSE MOTION TO ABATE |
| | ) | |
| | ) | |
| | ) | Case No. 07-001 |
| vs. | ) | |
| | ) | Tried at Guantanamo Bay, Cuba |
| | ) | On 4 June 2007 |
| | ) | |
| | ) | Before a Military Commission |
| OMAR AHMED KHADR | ) | Convened by MCCO # 07-02 |
| a/k/a "Akhbar Farhad" | ) | |
| a/k/a "Akhbar Farnad" | ) | Presiding Military Judge |
| a/k/a "Ahmed Muhammed Khali" | ) | Colonel Peter E. Brownback III |

**TO THE HONORABLE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW**

## Relief Sought

The Government ("Appellant") respectfully requests that this Court deny in full Appellee's Motion to Abate Proceedings of 19 July 2007. The Deputy Secretary of Defense appointed the judges to this Court in full compliance with the laws, rules, and regulations governing this Court.

## Burden and Standard

Pursuant to the Court's 20 July 2007 order, the Appellant herein shows cause why the Appellee's motion should be denied.

**Table of Cited Authorities**


1. *Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942)
2. *United States v. Giordano*, 416 U.S. 505 (1974)
3. *United States v. Mango*, 199 F.3d 85 (2d Cir. 1999)
4. *Morrison v. Olson,* 487 U.S. 654 (1988)
5. *Weiss v. United States*, 510 U.S. 163 (1994)
6. *Ryder v. United States*, 515 U.S. 177 (1995)
7. *United States v. Kalscheuer*, 11 M.J. 373, 377 (C.M.A. 1981)
8. *United States v. Bunting*, 4 C.M.A. 84, 89, 15 C.M.R. 84, 89 (1954)
9. *United States v. Walker*, 60 M.J. 354, 357 (C.A.A.F. 2004)
10. *Ryder v. United States*, 44 M.J. 9 (C.A.A.F. 1996)
11. Military Commissions Act (MCA) of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (17 Oct. 2006)
12. 10 U.S.C. § 113(d)(2000)
13. 10 U.S.C. § 943(a)(5)
14. 10 U.S.C. § 950f(a)
15. 10 U.S.C. § 950f(b)
16. William Winthrop, Military Law and Precedents 450 (2d ed. 1920 reprint)
17. Manual for Military Commissions
18. Department of Defense Directive 5105.02 (2007)

**Statement of Facts**

a. On 17 October 2006, the President signed the Military Commissions Act ("MCA") into law. The MCA provides for the establishment of the Court of Military Commission Review ("CMCR"), and the assignment of appellate judges to the Court.

b. On 1 December 2006, Secretary of Defense Donald Rumsfeld appointed four members to the CMCR, as cited by Defense Counsel's motion as Attachment A.

c. On 18 January 2007, Secretary of Defense Robert Gates published the Manual for Military Commissions (MMC), which specified that appellate military judges will be appointed to the CMCR pursuant to the MCA.

d. On 26 February 2007, Secretary of Defense Robert Gates reissued Department of Defense Directive 5105.02, previously issued on 9 January 2006, prior to the enactment of the MCA. This Directive provides that "Deputy Secretary of Defense Gordon England has full power and authority to act for the Secretary of Defense and to exercise the powers of the Secretary of Defense upon any and all matters concerning which the Secretary of Defense is authorized to act pursuant to law." DOD Directive 5105.02.

e. On 8 May 2007, pursuant to his authority under DOD Directive 5105.02, the Deputy Secretary of Defense Gordon England, approved the assignment of twelve (12) officers as appellate military judges on the CMCR, based upon the recommendation of the General Counsel, William J. Haynes II contained in the Action Memo (Attachment B to Appellee's motion).

f. On 15 June 2007, pursuant to his authority under DOD Directive 5105.02, the Deputy Secretary of Defense Gordon England, approved the appointment of Judge Bell as the Chief Judge of the CMCR, based upon the recommendation of the General

Counsel, William J. Haynes II contained in the Action Memo (Attachment D to Appellee's motion).

g. On 4 July 2007, the Appellant filed a brief with the CMCR in support of the Government's Appeal of the trial court's dismissal of all charges and specifications in the case of *U.S. v. Khadr*. In response, the CMCR on 11 July 2007 issued a Case Assignment notice, assigning this case to Panel 1 consisting of Judge Rolph, Judge Francis, and Judge Holden.

h. Later on 11 July 2007, the Defense filed a Motion for Emergency Relief, Motion to Attach, Motion to Admit Foreign Attorneys, and Chief Defense Counsels Motion to Waive Requirements of Rule 8(a). The Defense did not challenge the duly appointed judges of this Court at that time.

i. On 13 July 2007, the CMCR issued its ruling on all motions filed to date and a briefing order. In its ruling, the CMCR granted all of Appellee's motions. At the time, Appellee did not question or challenge the composition of the Court.

j. On 19 July 2007, the Appellee filed a Motion to Abate Proceedings in this Court arguing in essence that the three judges assigned by the Deputy Secretary of Defense to hear the appeal had not been validly appointed.

**Introduction**

Appellee's motion to abate is without merit and should be denied. It is well established that the Secretary of Defense may delegate any authority he has under the law, except where the law specifically prohibits such a delegation. Here, Congress specifically provided that the Secretary of Defense could delegate his authority to the Deputy Secretary of Defense, and the Secretary in fact issued such a delegation by

regulation. Accordingly, the appointment of the CMCR was entirely proper. Appellee fails to acknowledge this dispositive authority and instead urges the Court to consider case law that is either easily distinguishable as a matter of law or is inapplicable to the Appellee's claims.

In the first instance, Appellee evidently premises his entire motion upon a factual error. Contrary to Appellee's assertion, the Deputy Secretary exercised authority to appoint the Judges to the Court of Military Commission Review based on an actual delegation specifically permitted by Congress: "Unless specifically prohibited by law, the Secretary may, without being relieved of his responsibility, perform any of his functions or duties, or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate." 10 U.S.C. § 113(d) (2000). This statute reflects Congress's recognition that the Secretary of Defense administers the largest and most important department in the United States government, with members of the department spread throughout the world and currently engaging in vigorous combat operations in two distinct theaters of operation, as well as prosecuting the Global War on Terrorism, as the name implies, around the globe. The Secretary of Defense in fact made a specific delegation to the Deputy Secretary of Defense by reissuing DoD Directive 5105.2. The designation in the MCA of rule making authority is not inconsistent with the action taken by Deputy Secretary England in appointing Judges to the Court of Military Commission Review.

## Discussion

### I

### The Deputy Secretary of Defense is authorized by Statute and Department of Defense Directive to act in the same capacity as the Secretary himself.

Appellee's initial argument, that "[a]ssuming that the Secretary of Defense did not delegate to the Deputy Secretary of Defense his power to assign judges to this Court, the Deputy Secretary of Defense's action ... [is] *ultra vires* and void" (Appellee's motion, page 5) ignores two central facts: the Deputy Secretary of Defense is both authorized by statute to act in the Secretary's stead, and the Secretary of Defense has reaffirmed the Deputy Secretary's authority by Department of Defense (DoD) Directive.

10 U.S.C. § 113(d), cited by Appellee, specifically authorizes the Secretary of Defense to designate others to perform any of the Secretary's "functions or duties, or ... powers," unless prohibited by law. DoD Directive 5105.2, in turn, provides:

> 1. REISSUANCE AND PURPOSE
>
> 1.1. This Directive reissues Reference (a).
>
> 1.2. In accordance with the authorities contained in Reference (b), and except as expressly prohibited by law, Deputy Secretary of Defense Gordon England has full power and authority to act for the Secretary of Defense and to exercise the powers of the Secretary of Defense upon any and all matters concerning which the Secretary of Defense is authorized to act pursuant to law.
>
> 1.3. The *all-inclusive authority* reflected herein may not be delegated in toto; however, the Deputy Secretary of Defense is authorized to make specific delegations, as required.

2. EFFECTIVE DATE
This Directive is effective immediately.

DoD Directive 5105.2 (February 26, 2007) (emphasis added.)

The Military Commissions Act provides that the Secretary of Defense shall have the authority to appoint the judges of the Court of Military Commissions Review. *See* 10 U.S.C. § 950f(a) ("The Secretary of Defense shall establish a Court of Military Commission Review . . . ."); *id.* § 950f(b) ("The Secretary shall assign appellate military judges to a Court of Military Commission Review."). Nothing in that Act states that the Secretary of Defense may not delegate that authority under 10 U.S.C. § 113(d). The Secretary therefore properly delegated his authority to the Deputy Secretary of Defense under DoD Directive 5105.2.

Appellee fails even to cite DoD Directive 5105.2 in his motion, and, indeed, his initial argument is predicated on the false assumption that the Secretary of Defense "did not delegate" the Secretary's powers and authority to the Deputy Secretary of Defense. DoD Directive 5105.2 establishes that the Secretary of Defense in fact designated the Deputy Secretary of Defense to exercise the "all-inclusive" authority to act for the Secretary of Defense, and Appellee has not pointed to any positive source of law that prohibits the Deputy Secretary of Defense from acting in or on the Secretary's behalf when establishing this Court or assigning judges to the Court or to a particular panel of the Court. Thus, Appellee's initial argument fails as a matter of law and fact and the Court should reject the motion.

## II

**The Deputy Secretary of Defense was acting within his authority when he appointed the judges to the Court of Military Commission Review.**

The Deputy Secretary of Defense has the authority to act in any capacity that the Secretary of Defense may act. As stated above, there is no requirement for the Secretary of Defense to specifically delegate the authority to assign judges to the CMCR. Moreover, Congress has acknowledged the prominence and significant authority of the Deputy Secretary of Defense in 10 U.S.C. § 132 ("The Deputy Secretary shall perform such duties and exercise such powers as the Secretary of Defense may prescribe. The Deputy Secretary shall act for, and exercise the powers of, the Secretary when the Secretary is disabled or there is no Secretary of Defense... The Deputy Secretary takes precedence in the Department of Defense immediately after the Secretary.)[1] On 26 February 2007, Secretary of Defense Robert Gates reissued Department of Defense Directive 5105.02, which states, "Deputy Secretary of Defense Gordon England has full power and authority to act for the Secretary of Defense and to exercise the powers of the Secretary of Defense upon any and all matters concerning which the Secretary of Defense is authorized to act pursuant to law." DOD Directive 5105.02. The language of this directive is unequivocal and consistent with applicable statutes and the rules and regulations implementing the MCA, none of which prohibit the Secretary of Defense from delegating his authority.

The Appellee claims that 10 U.S.C. § 950f(a) and (b) establish the non-delegable authority of the Secretary of Defense to create the CMCR and assign judges to the Court,

[1] 10 U.S.C. § 132(b) & (c).

yet these provision do no more than recognize the Secretary's authority. Neither provision addresses delegation at all. Appellee argues further that the MCA creates a "negative inference" that the Secretary of Defense may not delegate authority without specific provisions permitting such delegation. Appellee supports its "negative inference" argument with two Supreme Court cases. *See Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942); *United States v. Giordano*, 416 U.S. 505 (1974). Both cases are not only readily distinguishable, but a correct reading of them amounts to a refutation of Appellee's arguments.

Appellee essentially argues that the Deputy Secretary of Defense's approval of the composition of the Court – which Appellee consistently mischaracterizes as an act based upon a "*sub*delegation" of the Secretary of Defense's authority[2] -- amounted to an *ultra vires* act because one section of the Military Commissions Act (MCA) authorizes the Secretary to delegate unconditionally (that is to say, to anyone or any agency, and not simply the Deputy Secretary of Defense) the ability to prescribe rules under the MCA. (*See* Appellee's motion, pp. 7-13; 10 U.S.C. § 949a(c).) This contention entails a strained, untenable interpretation of the law.

In *Giordano*, the statute at issue authorized the Attorney General to designate "any Assistant Attorney General" to apply for wiretap orders. (18 U.S.C. § 2516(1).) *Giordano* involved a wiretap application by the "Executive Assistant" to the Attorney General, rather than by an Assistant Attorney General. (*Giordano*, 416 U.S. at 513.) The Supreme Court recognized that "[a]s a general proposition," it would be "unexceptionable" to recognize that the Attorney General would have the authority to

[2] The distinction is more than semantic: many of the cases Appellee relies upon involve both a delegation and a subsequent or "sub" delegation, rather than – as is the case here – acts taken in reliance on a delegation authorized by statute and an implementing directive.

delegate his statutory authority "to other officers in the Department of Justice, including those on the Attorney General's own staff." (*Id.* at 513-14.) The Court, however, recognized that "the matter of delegation" in that instance was expressly addressed by statute and "specifically limited to delegating" the Attorney General's authority to Assistant Attorneys General. The Supreme Court thus found, not surprisingly, that section 2516(1)'s express limitation of the ability to apply for wiretaps to the Attorney General or an Assistant Attorney General rendered the application by the Attorney General's "Executive Assistant" void. *Id.* Here, of course, the Military Commissions Act contains no such express limitation on the person to whom the Secretary of Defense may delegate his statutory authority.

Appellee's reliance on *Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942), is similarly misplaced. In that case, the Court considered the legal authority of the Department of Labor's "Wage and Hour" administrator – himself a delegatee or functionary of the Secretary of Labor– to *sub*delegate the administrator's authority to issue subpoenas to regional directors of the Wage and Hour division. (*Id.* at 360; cited by appellee at pp. 8-9 of his motion.) The Court emphasized that Congress had expressed particular concerns about the subpoena power because it is "a power capable of oppressive use." (*Id.* at 364, 363.) Congress had carefully considered the appropriate limits upon its delegation and had specifically rejected legislative provisions that would have permitted a greater delegation. *See id.* at 364 ("The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power."). Accordingly, the Supreme Court found that "the subpoena power shall be delegable only

when an authority to delegate is expressly granted." (Id. at 366.) In the absence of a specific grant of the authority to subdelegate the subpoena power by Congress, such subdelegation was precluded, an interpretation evidently conceded by Appellee. (*Id.*)

This case obviously does not concern the subpoena power at all, and there is no evidence at all that Congress specifically considered and rejected a delegation of the Secretary's authority to establish the Court of Military Commission Review. Moreover, the authority of the Deputy Secretary to act is not a "subdelegation" of authority statutorily delegated to the Secretary of Defense, but is rather a direct delegation by the Secretary of Defense to the Deputy Secretary of Defense in a published, statutorily authorized directive. (10 U.S.C. § 113(d); DoD Directive 5105.2) The cases relied upon by Appellee either involve an effort to subdelegate properly delegated authority, or, as in *Giordano*, entail an attempted delegation to an official omitted from the statute authorizing delegation in the first place. The cases are therefore inapposite as a matter of law.

Additionally, the present case addresses a delegation to the Deputy Secretary of Defense, the second most senior official in the Department of Defense, appointed by the President by and with the advice and consent of the Senate, as opposed to an "Executive Assistant" as in *Giordano*, or the "Wage and Hour administrator" in *Cudahy*, both important positions, but of less significance than the Deputy Secretary of Defense.

Likewise, Appellee's reliance on *United States v. Mango*, 199 F.3d 85 (2d Cir. 1999) undermines, rather than supports, Appellee's position. In *Mango*, the Court of Appeals for the Second Circuit upheld the Secretary of the Army's authority, "acting through the Chief [of the Army Corps] of Engineers" to delegate to District Engineers

the ability to issue permits under the Clean Water Act (CWA). (*Id.* at 360.) The court specifically rejected the very same claims Appellee urges here: that the statutory grant of authority prohibited delegation, or that commonly accepted principles of statutory construction compelled the same result. Indeed, *Mango* specifically rejected the defendants' efforts to rely upon both Giodano and Cudahy to preclude delegation.

The MCA likewise contains no such limitation on the statutorily authorized ability of the Deputy Secretary of Defense to exercise the functions and powers of the Secretary. That the MCA broadly authorizes the Secretary to delegate the Secretary's rulemaking authority – a distinct function under the MCA – is irrelevant to whether the Secretary may delegate his authority to establish this Court. Again, the cases relied upon by Appellee involve either a subdelegation by a delagatee or a delegation to an official excluded from the terms of the statute authorizing delegation in the first instance. As such, none of the opinions cited by Appellee overrule or invalidate 10 U.S.C. § 113(d) or DoD Directive 5105.2.

Hence the MCA's authorization of the delegation of the Secretary of Defense's rulemaking authority does not supersede or nullify 10 U.S.C. § 113(d) or DoD Directive 5105.2, and the Deputy Secretary's approval of the action establishing this Court is effective. The Court should therefore deny Appellee's motion.[3]

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[3] The Appellant notes that the Appellee makes passing reference to the Appointments Clause of the Constitution. (Appellee's motion, pp. 12 – 13; *see Morrison v. Olson*, 487 U.S. 654 (1988).) This argument is completely unsupportable. The assignment of the military officers to this Court does not violate the appointment clause. *Weiss v. United States*, 510 U.S. 163 (1994) (Court held that the Constitution's Appointments Clause did not require special appointment of military judges by either the President, with Senate confirmation, or a "Department Head."). *Cf.* Ryder v. United States, 515 U.S. 177 (1995) (civilian judges of Coast Guard Court of Criminal Appeals not properly appointed), on remand, 44 M.J. 9 (C.A.A.F. 1996) (Secretary of Transportation could appoint civilians as appellate military judges).

## III

## The delegation of authority to assign this Court's judges does not constitute a "proposed modification of the procedures" for military commissions and does not require notification of Congress.

Appellee's argument that the "rulemaking" ability of the Secretary of Defense under the MCA has been implicated by the Deputy Secretary of Defense's approval of the Court ignores the clear statutory grant of authority under 10 U.S.C. § 113(d): the delegation is not a "rule" at all, but rather an exercise of the Secretary's statutory powers under section 113(d). In the present case, the Deputy Secretary of Defense merely carried out his duties as required, consistent with statute and regulation. The delegation by the Secretary, or action taken by the Deputy Secretary, does not amount to a modification of the procedures and does not require reporting to Congress.

## IV

## The "Acting Chief Judge" acted within his inherent authority to assign the military judges to the panel hearing this case

The Appellee's contention that Judge Rolph could not assign this case to a panel of three judges because the statutory and regulatory authority governing the Court do not "mention" the "position of 'Deputy Chief Judge'" or "'Acting Chief Judge'" is meritless and should be denied. Notably, Appellee does not challenge the qualifications of Judge Rolph or, for that matter, any of the other members of the Court or the panel.

In any event, there are traditionally two alternatives to succession in the military. William Winthrop, Military Law and Precedents 450 (2d ed. 1920 reprint) ("Such officer will usually have been temporarily or indefinitely detailed for the command by the

President, (or other superior) but, where no such formal detail has been made, and none is required by statute or regulation to be made, he may be an officer upon whom the command has devolved by reason of his seniority in rank according to the usage of the service.) (parenthesis in original). *See also United States v. Kalscheuer*, 11 M.J. 373, 377 (C.M.A. 1981) (Frequently, military regulations or customs provide in the command hierarchy for a vice commander or deputy commander who acts in the commander's stead when he is absent or otherwise unavailable. . . . Of course, this authority would exist apart from any formal delegation.); *United States v. Bunting*, 4 C.M.A. 84, 89, 15 C.M.R. 84, 89 (1954).

In the context of the present case, first, the next senior person in the organization succeeds if the incumbent, in this case the Chief Judge, is absent. Second, in the event of such absence, a competent authority may direct who may succeed and act as Acting Chief Judge. Deputy Secretary England has designated Captain Rolph as the Acting Chief Judge. "While courts typically have either statutory or internal procedures to designate an acting chief judge when the chief judge is recused, see, e.g., Article 143(a)(5), UCMJ, 10 U.S.C. § 943(a)(5), the absence of such a procedure does not preclude an appropriate authority from ensuring the continuity of a court's operations in the event of the chief judge's recusal. *United States v. Walker*, 60 M.J. 354, 357 (C.A.A.F. 2004). Under statute and the actual delegation of authority, Secretary England is such an appropriate authority.

**Conclusion**

For the aforementioned reasons the Court should deny the Defense motion to Abate in full without additional argument and proceed with the briefing schedule previously established in the present case.

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## CERTIFICATE OF COMPLIANCE WITH RULE 14(i)

1. This brief complies with the type-volume limitation of Rule 14(i) because:

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Dated: 25 July 2007

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to Lieutenant Commander William Kuebler on the 25th day of July 2007.

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